

No. 13,226

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

JOHN PHILLIP WHITE,

Appellee.

SUPPLEMENT TO
APPELLANT'S OPENING BRIEF.

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Subsequent to the filing of the Appellant's Opening Brief in the instant appeal, it was called to the attention of appellant and its counsel that Exhibit I which the United States has referred to in its appeal brief had been erroneously admitted into evidence at the time of trial of this matter in the District Court and thereby had been erroneously made part of the instant appeal record. In order to rectify this error and to prevent this Honorable Appellate Tribunal from being misled by appellant's reference to this Exhibit, it was stipulated between counsel for the appellant and appellee that said Exhibit I was not to be considered part of the record on appeal and that appellant be

afforded an opportunity to rectify its references to this evidence by a Supplemental Brief.

In order to properly apprise the Honorable Appellate Tribunal as to where appellant has referred to this erroneously admitted Exhibit I, appellant is taking this occasion to specifically set forth said references:

(a). On page 15 of Appellant's Opening Brief, reference is made to a written statement of Sergeant Hodges pertaining to the steps that had been taken to clear the firing range area of duds and said Sergeant's further statement to his knowledge, no one knew of the existence of the duds. This statement is designated as defendant's Exhibit L and does in fact constitute a portion of the documents that comprise the erroneously admitted Exhibit I;

(b). On page 17 of Appellant's Brief, the entire second paragraph thereof, appellant again has referred to Exhibit I with regard to the answers of Captain Charles D. Pitre to plaintiff's written interrogatories regarding the method of conducting the decontamination program of unexploded shells at Camp Beale. This reference was made with respect to Point III of appellant's questions raised on appeal to the effect that the clearing of the alleged dud area was in fact discretionary;

(c). On page 27 of Appellant's Brief, appellant referred once again to the statement of Sergeant Hodges designated as Exhibit L in the Brief which was in fact a part of the erroneously admitted Ex-

hibit I. This reference to Exhibit I was in support of Point VII of Appellant's questions raised on Appeal to the effect that the defendant had no duty to warn the plaintiff of the danger likely to be encountered by him and that the defendant did warn plaintiff of the possible danger.

Appellant concedes that it is not entitled to rely upon these erroneously admitted statements and answers to interrogatories in its Brief or to refer or to use same on the occasion of the oral argument of this appeal.

However, pursuant to the stipulation entered into between counsel for the appellee and appellant, appellant is taking this occasion to supplement its Opening Brief without reference to the erroneously admitted evidence, only to the extent that previous reference to said evidence has affected the contents of Appellant's Brief.

With regard to Point II of Appellant's Brief (Brief ps. 12-15), appellant re-asserts its contention that despite deletion of its reference to Sergeant Hodges' statement, there is ample cited testimony and evidence in this portion of Appellant's Brief to sustain and substantiate its contention that at the time of trial, there was no showing of any negligence on the part of the United States. The evidence is likewise devoid of proof of any negligence on the part of any identifiable employee of the United States so as to bring into being the respondeat superior doctrine of liability of the Federal Tort Claims Act thereby

imposing liability on the appellant for the injuries sustained by appellee. Reference to the complete text of Point II of Appellant's Brief will bear out this fact, irregardless of any statement of Sergeant Hodges.

Insofar as appellant has referred to the answers of Captain Pitre to plaintiff's interrogatories in Point III of its brief, said reference was made only to further substantiate and uphold the appellant's position that the de-dudding program at Camp Beale was discretionary and therefore any injuries arising out of this program was within the exception of the Federal Tort Claims Act.

The question as to whether this de-dudding operation, as carried out at Camp Beale, was or was not discretionary stands or falls upon the contents of War Department Circular I-195 (Appellant's Exhibit No. 12, p. 215-216). From a reading of this directive, there can be no other conclusion drawn that the means "so far as practical" of accomplishing the removal and neutralization of duds was discretionary and rested solely within the sound judgment and discretion of the individual Commandants of the military reservations in question. As can be seen from the record and testimony of Captain Jones (T. 289), the answers of Captain Pitre, now deleted from this appeal record, were merely cumulative to plaintiff's contention that the Camp Beale's de-dudding program was discretionary and the absence of said answers of Captain Pitre from this appeal record in no way detracts from appellant's position in this regard.

So far as appellant's reference to the erroneously admitted statement of Sergeant Hodges in Point II of its Brief on page 270, the appellant contends that despite the unavailability of said statement for use in this appeal, there is sufficient evidence in the record to sustain its position that the United States had no actual knowledge of the existence of any duds at Camp Beale. This contention is further strengthened by the fact that the evidence is completely lacking of any showing that the United States through its agents and employees had any actual knowledge of the presence or existence of the unexploded projectile which caused appellee's injuries and which at the time of the explosion had the physical appearance of a "chunk of iron" (T. 121).

Without attempting to further impose upon this Appellate Court, additional argument and citations of authorities, appellant is content to rest its appeal on the authorities and arguments cited in its Opening Brief and supplement herein.

Dated, San Francisco, California,
December 15, 1952.

Respectfully submitted,

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